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Bard Peripheral Vascular, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability
Litigation,

No. 2:15-MD-02641-DGC

**JOINT MOTION FOR LEAVE TO
EXCEED PAGE LIMIT FOR
BRIEFING RELATED TO
LEHMANN REPORT**

Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively “Bard”) and the plaintiffs hereby jointly move for leave to exceed the page limits defined in Local Rule of Civil Procedure 7.2(e) for the memorandum by the moving party (Bard) and the plaintiffs’ responsive memorandum regarding whether the December 15, 2004, report of Dr. John Lehmann (“the Lehmann Report”) is protected work product. The parties each request 30 pages to brief the issues,¹ and in support of their motion state as

¹ At this time, Bard thinks that the eleven pages afforded by Local Civil Rule 7.2(e)(2) for its reply brief will be sufficient, but reserves the right to request additional leave, if necessary, upon review of the plaintiffs’ responsive memorandum.

1 follows:

2 1. On October 30, 2015, the Court entered Case Management Order No. 2,
3 ordering Bard to file a motion for protective order regarding the Lehmann Report.

4 2. Before the MDL was formed, Bard and various members of the Plaintiffs'
5 Steering Committee litigated the issue of whether the Lehmann Report is protected from
6 discovery and use in cases around the country. Earlier this year, the Lehmann Report was
7 entered into evidence over Bard's objection during trial. Details and the implications of
8 the procedural history and these various rulings are relevant to the Court's resolution of
9 the motion for protective order.

10 3. Bard contends that there is an extensive factual record of evidence relating
11 to its claim to work-product protection for the Lehmann Report, which Bard intends to lay
12 out for the Court's consideration in resolving the motion for protective order. The
13 plaintiffs do not concede that the evidentiary record is complete but agree that both parties
14 will need to address the existing evidence and that the plaintiffs intend to respond to
15 Bard's assertions regarding that evidence.

16 4. Courts that have addressed the issue to date have addressed the question
17 under two different work-product standards, the "because of" test and the "primary
18 motivating purpose test." The parties believe that both of these will need to be briefed for
19 the Court's resolution of the motion for protective order.

20 5. The plaintiffs historically have raised several different arguments in favor of
21 production even if the Lehmann report were considered work product, including various
22 waiver arguments as well as that any work-product protection is overcome by their
23 substantial need for the Lehmann Report to prosecute their claims against Bard. Each of
24 these issues will need to be briefed for the Court's resolution of the motion for protective
25 order.

26 6. The Court also directed the parties to address whether an evidentiary
27 hearing is needed to resolve Bard's motion for protective order. (CMO No. 2, at 5.) The
28 parties believe at this point that this issue will be contested in the briefing.

7. The Court also directed the parties to address the effect that the Court's ruling should have in cases where the work-product status of the Lehmann report has already been decided. (*Id.*)

8. The parties do not believe that all of these issues can sufficiently be addressed in the seventeen pages allotted to each party in Local Civil Rule 7(e).

WHEREFORE, the parties jointly seek leave of Court to exceed the page limits, and request that the Court allow Bard 30 pages for its initial supporting memorandum and the plaintiffs 30 pages for their responsive memorandum.

DATED this 20th day of November, 2015.

GALLAGHER & KENNEDY, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2015, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

s/Amanda C. Sheridan

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